No. 82-1540

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *et al.*,
Petitioners,

v.

ROBERTO QASIM, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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PETITIONERS' REPLY MEMORANDUM

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TABLE OF AUTHORITIES

Cases: Page

TABLE OF AUTHORITIES—Continued

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Respondents Roberto Qasim, *et al.*, argue that the court below correctly interpreted the Eleventh Amendment and the WMATA Interstate Compact, and that its decision does not warrant review by this Court.

Both State signatories to the WMATA Interstate Compact disagree. *See* Md.-Va. *Amici* Br. 1-9, 11.

Because respondents' brief largely repeats the view of the District of Columbia Court of Appeals, which we have already addressed in our petition, we limit our reply

brief to the following points to correct some mistaken or misleading assertions of law and fact made by respondents.

But before doing so, we believe it important to note at the outset that there can no longer be any question that WMATA is an interstate agency and, as such, is fully entitled to invoke the same Eleventh Amendment immunity that the States of Maryland and Virginia could assert.[1] Both of the standard guides for construing an interstate compact—the plain language of its text and the construction given the compact by its signatories—compel the conclusion that WMATA may invoke the Eleventh Amendment. Pet. 15-17; Md.-Va. *Amici* Br. 7-8.[2] Maryland and Virginia have clearly stated that "[they] agree with Petitioners that WMATA is an arm of the signatory States, and is entitled to invoke the same Eleventh Amendment immunity that Maryland and Virginia could." Md.-Va. *Amici* Br. 8. Accordingly, the only remaining question is whether WMATA is somehow barred from invoking the immunity to which it may otherwise lay claim. None of the reasons given by respondents for such a conclusion can pass muster.

1. Respondents argue (Opp. 6-9 & n.9) that (a) because the United States District Court for the District of Columbia in 1966 was an Article III and Article I court, Section 81 of the WMATA Compact waives WMATA's Eleventh Amendment immunity in the local courts of the District; (b) this Court's decisions in *Pal-*

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[1] In addition to the cases cited in the Petition (pp. 11-14 & nn.7 & 9), the United States Court of Appeals for the District of Columbia Circuit, in a case involving WMATA, has indicated its approval. *Morris* v. *WMATA*, No. 81-1209 (Mar. 8, 1983), slip op. at 6-7.

[2] This is true even under the test offered by respondents: "The appropriate inquiry is whether the States intended WMATA to have the same immunity as the States themselves." Opp. 6 n.6. Maryland and Virginia have definitively answered that question in the affirmative. Md.-Va. *Amici* Br. 8.

more v. *United States*, 411 U.S. 389 (1973), and *Swain* v. *Pressley*, 430 U.S. 372 (1977), undermine WMATA's Eleventh Amendment argument; and (c) WMATA has waived its immunity by litigating *other* cases in the local courts. All three arguments are simply wrong as a matter of law, and the last misstates the record as well.

a. Respondents' premise for their first argument—that the United States District Court for the District of Columbia was, in 1966, an Article I court—is wrong as a matter of law. Respondents have confused two very different issues by intermixing (i) the question of whether a particular court is an Article III or Article I court with (ii) the question of whether an Article III court may constitutionally be given Article I jurisdiction. In *O'Donoghue* v. *United States*, 289 U.S. 516 (1933), this Court stated that the predecessors to the current Article III courts in the District of Columbia were also Article III courts—that is, the judges of these courts were entitled to life tenure during good behavior, as well as a nondiminishable salary—notwithstanding their authority to exercise Article I as well as Article III power.[3] But *O'Donoghue* did *not* rule that these courts were Article I courts because of their Article I authority. At best, *O'Donoghue* noted in dictum that these were hybrid Article III courts because of their combined Article III and Article I powers. Therefore, because the United States District Court for the District of Columbia in 1966 was an Article III court (as *O'Donoghue* specifically held), and even assuming that *O'Donoghue's* dictum is still valid

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[3] Respondents incorrectly cite *Palmore* v. *United States*, *supra*, and *National Mut. Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582 (1949), for this proposition. Neither case so holds. *Palmore* upheld the constitutionality of Congress' creation of *purely* Article I courts rather than Article III or hybrid courts for the District of Columbia. And six Justices in *Tidewater Transfer Co.* wrote that Congress could *not* give an Article III court Article I jurisdiction. 337 U.S. at 607-617, 627-645, 646-655.

—a proposition itself open to doubt[4]—*O'Donoghue* does not answer the question posed here: whether a State may be sued in an Article I court consistently with the Eleventh Amendment.

Neither *O'Donoghue* nor any later decision of this Court ever upheld the exercise of Article I jurisdiction by such a hybrid court over a State's claim that the Eleventh Amendment forbade that result. Respondents' argument that by submitting themselves to suit in the then-existing Article III courts in the District of Columbia, the States also submitted themselves to suit in the as-yet-uncreated Article I courts for the District is unsupported by *O'Donoghue* or any other decision of this Court. Moreover, Maryland and Virginia have disavowed any such interpretation of Section 81. Md.-Va. *Amici* Br. 6-7. Therefore, respondents' argument is without support.[5]

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[4] This ruling in *O'Donoghue* was a clear departure from prior law that had assumed that Articles I and III were mutually exclusive sources of federal judicial authority (*e.g.*, *American Ins. Co.* v. *Canter*, 26 U.S. (1 Pet.) 511 (1828); Katz, *Federal Legislative Courts*, 43 Harv. L. Rev. 894 (1930)), and that the federal courts in the District were Article I courts only. *E.g.*, *Federal Radio Comm'n* v. *General Electric Co.*, 281 U.S. 464 (1930); *Ex parte Bakelite Corp.*, 279 U.S. 438, 460 (1929). Moreover, both *Tidewater Transfer Co.* and *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962), cut away the *O'Donoghue* dictum's sustaining logic. *See* note 3 *supra*. Accordingly, it is not altogether clear that the *O'Donoghue* dictum, on which respondents' argument must necessarily rest, is still valid today. In fact, this Court has never upheld the exercise of Article I authority by any such hybrid court.

[5] Respondents have devoted only a footnote (Opp. 9 n.10) to their attempt to rehabilitate the lower court's erroneous interpretation of *Nevada* v. *Hall*, 440 U.S. 410 (1979). In so doing, respondents do not attempt to suggest that *Hall* itself is applicable, but argue instead that Section 1 of the WMATA Interstate Compact treats the District of Columbia as a State, thereby incorporating *Hall* by reference. First, the Compact was drafted 13 years prior to *Hall*, and therefore it is clear that the States could not have adopted Section 1 with *Hall* in mind. Second, any attempt to rely upon Section 1 of the Compact as authorizing suit in the local District courts

b. Furthermore, neither *Palmore* nor *Swain*, upon which respondents heavily rely (Opp. 6-9), is at all dispositive of the Eleventh Amendment issues posed by this case. *Palmore* held only that Article III did not, *ex proprio vigore*, require Congress to vest the local courts of the District with Article III attributes (411 U.S. at 399-400), and *Swain* added only the proposition that the Suspension Clause (Art. I, § 9, cl. 2) did not independently forbid what *Palmore* had ruled Article III permitted. 430 U.S. at 379-384. Neither decision even adverted to the Eleventh Amendment, which is an explicit limitation upon the "Judicial power of the United States," regardless of its proper source (*Palmore*), which is entirely separate from the Suspension Clause (*Swain*), and which reflects concern for intergovernmental immunity rather than unitary legislative authority (*Palmore*; *Swain*).

Indeed, *Palmore* and *Swain* reinforce WMATA's argument that the Eleventh Amendment is fully applicable in Article I courts. *Swain* acknowledged that Congress' Article I power to define the jurisdiction of the local courts of the District—a matter already approved in *Palmore*—was nevertheless subject to constitutional limitations independent of Article III, of which the Eleventh Amendment is the most direct and explicit example. Because this Court had already ruled prior to *Swain* that Congress' exercise of its Article I power to charter a federal corporation does not *eo ipso* nullify a State's Eleventh Amendment immunity (*Smith* v. *Reeves*, 178 U.S. 436 (1900)), *Swain* supports WMATA's argument that the Eleventh Amendment independently limits that selfsame

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must run aground on the specific provision in the Compact performing that very chore—Section 81—which makes no mention of suits against WMATA in the local courts. Finally, and most importantly, Maryland and Virginia agree with petitioners that nothing in the Compact supports respondents' view of Section 1. "[B]oth States interpret the Compact to deny the local District of Columbia courts jurisdiction over WMATA." Md.-Va. *Amici* Br. 8.

Article I authority to create the local courts for the District.

c. Respondents' third argument—that WMATA itself has waived its immunity by litigating *other* cases in the local courts of the District—is nothing if not original. It is well established that a State may assert the Eleventh Amendment as a bar to federal jurisdiction at any time without forfeiting the claim, and may even raise that claim for the first time in this Court.[6] Therefore, even if WMATA had not raised the Eleventh Amendment beforehand in this case—as it most assuredly did (*e.g.*, Pet. App. 4a) and as respondents do not deny—WMATA could raise that claim now.

Respondents have also misstated the record. As their own Opposition Brief points out (p. 3), WMATA challenged the jurisdiction of the Superior Court over WMATA as early as 1972—the year in which the Court Reform Act went into effect—in *Quarles* v. *Metrobus-WMATA*, CA No. 7286-73 (D.C. Super. Ct.). Moreover, WMATA has pressed this issue before *all* other Superior Court judges, and all of these judges save one have ruled in WMATA's favor, dismissing the complaint for lack of subject matter jurisdiction.[7]

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[6] *E.g.*, *Patsy* v. *Board of Regents*, 102 S. Ct. 2557, 2568 n.19 (1982); *Alabama* v. *Pugh*, 438 U.S. 781, 782 n.1 (1978) (per curiam); *Edelman* v. *Jordan*, 415 U.S. 651, 678 (1974); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 467 (1945).

In fact, this Court has even raised the Eleventh Amendment itself when it appeared potentially applicable, notwithstanding a State's decision to abandon the defense earlier in the same case. *Sosna* v. *Iowa*, 419 U.S. 393, 396 n.2 (1975).

[7] *E.g.*, *Lewis* v. *WMATA*, CA No. 10636-80 (D.C. Super. Ct. 1981) (Judge Sylvia Bacon); *Robinson* v. *WMATA*, CA No. 6610-80 (D.C. Super. Ct. 1982) (Judge Carlisle Pratt); *Johnson* v. *Wells*, CA No. 14720-80 (D.C. Super. Ct. 1982) (Judge John F. Doyle); *Lagroom* v. *WMATA*, CA No. 14272-79 (D.C. Super. Ct. 1982) (Judge Nicholas S. Nunzio). *Contra Butler* v. *WMATA*, CA No. 1486-81 (D.C. Super. Ct. 1982) (Judge Frank E. Schwelb). Re-

2. Respondents' argument (Opp. 4, 11) that WMATA's consent to be sued for its proprietary torts renders irrelevant the question of whether one court or another is the appropriate forum for suit manifests respondents' faulty grasp of Eleventh Amendment principles. This Court has consistently recognized that a State's waiver of immunity for a particular claim in one court has no effect at all on the State's right to assert its immunity in another court. *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U.S. 573, 574 (1946); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. at 465.

3. Respondents' argument (Opp. 9-10) that the court below correctly interpreted Section 81 of the WMATA Interstate Compact simply repeats the conclusion of the court below, which we have already shown to be in error. Pet. 24-28. The central flaw with that argument (as with the construction given Section 81 by the court below) is that it *reverses* the appropriate method of statutory construction. Rather than construe the terms of Section 81 and determine whether the Court Reform Act did or could modify Section 81's terms, respondents skip over Section 81 and look entirely to the terms of the 1970 Court Reform Act. As we have already shown—and both Maryland and Virginia agree (Md.-Va. *Amici* Br. 8-9)—the decision below is at odds with the plain language of Section 81 and the construction given that Section by its signatories, with nothing in the text or legislative history of the Court Reform Act to the contrary.

4. Respondents also offer a potpourri of reasons why the decision below makes good sense, even if incorrect. Opp. 5, 11-13. These reasons not only fail to find a source in the WMATA Interstate Compact but effectively demonstrate that the Article I District of Columbia Court of Appeals legislatively and unilaterally amended the terms

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spondents' intimation (Opp. 2 & n.2) that only one Superior Court judge has ruled in WMATA's favor is simply wrong.

of the Compact, without obtaining the consent of the state signatories thereto.

a. Respondents' argument (Opp. 5) that the decision below affects only a small number of cases because WMATA can remove all future suits to the Article III courts of the District is wrong on two counts. It is black-letter law that a defendant cannot remove a suit from the court of its original filing to a federal court if the original court did not have subject matter jurisdiction over the suit. *Freeman* v. *Bee Mach. Co.*, 319 U.S. 448 (1943); *Lambert Run Coal Co.* v. *Baltimore & O. R.R. Co.*, 258 U.S. 377, 382 (1922); 14 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3721, at 521-523 (1976). Respondents' contention that WMATA could remove future suits simply points out the fact that the issue of the Superior Court's jurisdiction to entertain suits against WMATA will certainly arise in the Article III courts of the District, and, therefore, review is plainly warranted at this time. Admixed to that consideration is the fact that WMATA is an interstate agency and will, like any government agency, be subject to tort suits on a recurring basis. Maryland and Virginia have already expressed this concern, pointing out that this Court ought therefore to settle the issues in this case now rather than later. Md.-Va. *Amici* Br. 10 & n.7.

b. Respondents' argument (Opp. 11-13) that the decision below is in conformance with the purpose of the Court Reform Act and prevents disruption of the administration of justice in the District wrongly assumes, without any support in the text or legislative history of that Act, that suits against an interstate agency are "'purely local matters'" (*Swain*, 430 U.S. at 375, quoting S. Rep. No. 405, 91st Cong., 1st Sess., p. 5 (1969)) with which that Act was concerned. Moreover, both Maryland and Virginia strongly disagree with any such conclusion. Md.-Va. *Amici* Br. 8-9. Respondents' argument also overlooks the fact that Section 81 of the Compact

already authorizes any plaintiff to sue WMATA in the United States District Court for the District of Columbia. In other words, Congress has decided that the District's Article III courts *are* an appropriate forum for suits against WMATA. Reversal is therefore hardly contrary to the expressed intent of Congress.

c. Finally, respondents argue (Opp. 13) that reversal will wreak havoc upon choice of law matters in suits against WMATA. Choice of law has nothing to do with the issue of whether a court has jurisdiction to make the choice. Section 81 does not eliminate *all* tort actions of *any* type from the Superior Court's jurisdiction, only those tort suits involving WMATA. Hence, just as the Article III courts throughout the Nation apply state tort law in Federal Tort Claims Act or diversity cases without wreaking havoc on state court systems, so too the Article III courts in the District of Columbia will apply the tort law developed by the local District courts in cases not involving WMATA. Respondents' rather overblown (and manifestly irrelevant) argument hardly justifies the decision below.

5. Finally, the issues posed by this case are not simply matters of local law that should be left to the District of Columbia courts to decide, as respondents suggest. Opp. 11 n.13. The substantial questions raised by this case cannot be shrugged off as matters of only local interest. That is so for four reasons.

First, the relationship between Article I and Article III courts and the Eleventh Amendment is not simply a matter of local substantive tort law which the courts of the District should be free to decide. It goes to the very core of the structure of our federal judicial system.

Second, the interstate compact issues *by definition* are also not simply matters of interest only to the District. These issues are of great importance to Maryland and Virginia and to other States as well.

Third, both of the above issues involve the *jurisdiction* of the local District of Columbia court system, rather than a matter of substantive law, and are therefore clearly of the type that this Court has always considered appropriate for its review. Pet. 10-11 & n.4, and cases there cited. Surely the question of whether a State may be sued in an Article I court notwithstanding the Eleventh Amendment is as important an issue as whether the District of Columbia Court of Appeals may regulate the local bar. *See District of Columbia Court of Appeals* v. *Feldman*, 51 U.S.L.W. 4285 (U.S. Mar. 23, 1983).

Fourth, the substantial objections that the State of Maryland and the Commonwealth of Virginia have raised to the judgment below should demonstrate that the Eleventh Amendment and interstate compact questions transcend any peculiarly local flavor that this case might otherwise have. These issues are of serious concern to both States, as evidenced by their participation as *amici* in support of petitioners. We submit that the concern expressed by these States—which have agreed with petitioners on *every* issue presented in the petition—is entitled to great respect by this Court, and strongly counsels in favor of review. Indeed, this is now the *only* court in which Maryland and Virginia can hope to correct the errors of the court below. This Court should do so by granting the petition and reversing the judgment of the court below.

CONCLUSION

We submit that the reasons given in the petition and in the *amici* brief filed by Maryland and Virginia demonstrate that the court below has decided several novel issues involving the Eleventh Amendment and the WMATA Interstate Compact in a manner contrary to settled Eleventh Amendment principles and at odds with the text of the WMATA Compact and with the signatories' construction thereof. This case clearly merits this Court's review. The Court should grant the petition and reverse the judgment below.

Respectfully submitted,

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